

(2011) 10 MP CK 0079

In the Madhya Pradesh High Court

Case No : Writ Petition No. 10092 of 2009 (S)

Union of India and Others

APPELLANT

Vs

Shri Devraj Bais and Others

RESPONDENT

Date of Decision : 13-10-2011

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19
Constitution of India, 1950 — Article 226, 309, 32
Industrial Recruitment Rules, 2006 — Rule 3, 5

Citation : (2012) ILR (MP) 311

Hon'ble Judges : T.K. Kaushal, J; Sanjay Yadav, J

Bench : Division Bench

Advocate : Brian D" Silva with V. Bhide, for the Appellant; Rakesh Pandey, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Yadav, J.—Order dated 6.4.2009 passed by the Central Administrative Tribunal, Jabalpur Bench in an application u/s 19 of the Administrative Tribunals Act, 1985. O.A. No. 137/2009 is being challenged by the petitioner. The controversy was whether the petitioners (who were respondents in O.A. 137/2009) were justified in their action of reducing the status of the respondents (who were applicants in O.A. 137/2009) from that of Group "C" (Industrial), highly skilled in pay scale of Rs. 4000-6000 to that of Group "C" (Industrial) skilled in the pay scale of Rs. 3050-4590.

2. Four posts of Welder in Group "C" (Industrial) Highly Skilled in the pay scale of Rs. 4000-6000 along with posts of TCM (03), Inst. Mech (02), EE Mech (01) and Elect (01) to be filled only by deputation/re-employment were released by the Directorate General of EME : Master General of Ordnance Branch: Integrated HQ of MOD (Army) DHQ: Delhi vide circular No. B/15198/Dep/Re-emp/Re1/EME Civ-2 dated 7th September 2007. The circular was issued on the strength of HQ letter No. B/15198/Policy/Dep/Re-emp/EME-Civ-2 dated 2/12/2005. The

recruitment was to be strictly in accordance with Recruitment Rules (SRO 29/2006).

3. Pursuance to said recruitment respondents herein were appointed as Welder Group "C" Highly skilled in grade Rs. 4000-6000 on various dates in 2007-08 as Ex Serviceman on Re-employment.

4. After assumption of charge of the post on which they were appointed, the respondents were served with order dated 16.1.2009 amending the appointment letter that, in place of pay scale of Rs. 4000-100-6000, their appointment was made on pay scale of Rs. 3050-75-3950-80-4590, which is the pay-scale of Welder Skilled, a post lower than on which recruitment was made.

5. Reasons for amendment though are not borne out from the authority letter, i.e., Directorate General of EME Integrated HQ of MOD (Army) letter No. B/15198/Dep/Re-emp/Rel/EME Civ-2 dated 05th January 2009 on the basis whereof the amendment in the appointment letter has been effected, but is spelt out in the counter reply filed before the Tribunal that the post of Welder, Group "C" (Industrial) Highly Skilled Grade Rs. 4000-100-6000 is a promotional grade of skilled grade Rs. 3050-4590 which under S.R.O. 29/2006 can be filled in by promotion only. That a mistake had occurred due to a typographical error in the letter dated 17.9.2007 wherein the trade Welder was erroneously shown under the Highly skilled grade Rs. 4000-6000 instead of 3050-4590.

6. The Tribunal on the principle of constructive estoppel and deemed relaxation of rules and that only the pay scale was changed and that the entire recruitment being not set at naught, rejected the plea that the typographical mistake had crept in the release letter.

7. Petitioner questions the correctness of the order on the ground that the recruitment Rules SRO 29/2006 does not provide for appointment of Welder in Grade Rs. 4000-6000 which is high skilled (Industrial) Grade either by deputation/re-employment or direct recruitment, but is to be filled by 100% promotion from the skilled grade. Whereas recruitment of Welder in Grade Rs. 3050-4590 can be by direct recruitment or by deputation or reemployment. It is urged that in absence of express order relaxing the Rules regarding mode of recruitment by the Central Government, which is empowered under Rules 5 of SRO 29/2006, an erroneous assumption of an authority, subordinate to the central government will not create any right in favour of respondents. It is urged that the Tribunal has erred in holding that there was a deemed relaxation under SRO 29/2006. It is urged that there being a specific condition of recruitment, appointments in deviation thereto, in absence of order of relaxation, were illegal and were rightly rectified, instead of cancelling the entire selection.

8. Reliance is placed on the decision in Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, and Union of India (UOI) and Another Vs. Narendra Singh, to substantiate the submissions.

9. The respondents on their turn support the decision by the Tribunal. It is urged that a conscious decision was taken by the competent authority to fill in the post of Group "C" High Skilled Welder in Grade Rs. 4000-100-6000 through re-employment. The authority cannot now turn around, to the detriment of the respondents and treat the recruitment as for a lower post. Petitioner places reliance on the decision in Union of India and others v. MES Employees Union and another W.P. No. 4510/1999 decided on 5.7.2000.

10. Considered the rival submissions.

11. The Rules which govern the field are Corps of Electronics and Mechanical Engineer Industrial Recruitment Rules, 2006 which are framed under Article 309 of the Constitution.

12. Rule 3 stipulates that the method of recruitment, age limit, qualification and other matters relating to the said posts is as specified in columns (5) to (14) of the schedule appended with rules.

13. The post of Welder (Highly Skilled) in Grade Rs. 4000-6000 is at Srl. No. 20 of the Schedule, column 11 whereof prescribes the mode of recruitment by "Promotion" whereas column 12 stipulates the feeder grade wherefrom the promotion is made to the post of Welder (Highly skilled). It provides that "welder skilled with a pay scale of Rs. 3050-75-3950-80-4590 having 8 years regular service in the grade on the basis of qualifying departmental tests held for the purpose." A note appended thereunder stipulates: "Note: Where juniors who have completed their qualifying or eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying or eligibility service or two years, which ever is less, and have successfully completed their probation period for promotion to the next higher grade along with their juniors who have already completed such qualifying or eligibility service".

14. Whereas the post of Welder (skilled) in grade of Rs. 3050-4590 at Sl. No. 34 which is also a Group C post as per column 11 can be filled by "Promotion, failing which by absorption, failing both by deputation re-employment for ex-servicemen and failing all by direct recruitment." Column 12 stipulates "Promotion : Tradesmen Mates with a pay scale of Rs. 2650-65-3300-70-4000 of this trade having 4 years regular service in the grade on the basis of qualifying department test held by the purpose. Absorption: Absorption of persons holding similar or higher posts in defence services and possessing the qualifications and experiences as laid down in column (8). For Ex-serviceman : Deputation/re-employment: The armed Forces personnel including combatants from Corps of Electronics and Mechanical Engineers due to retire or who are to be transferred to reserve within a period of one year and having the requisite experience and qualifications prescribed for them in column (8). Such persons would be given terms up to the date on which they are released from armed Forces, thereafter

they may be continued on reemployment. Note: Where juniors who have completed their qualifying or eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying or eligibility service or two years, whichever is less, and have successfully completed their probation period for promotion to the next higher grade along with their juniors who have already completed such qualifying or eligibility service.

15. Thus, under Rules the post of Welder (Skilled) is earmarked to be filled in by re-employment for ex-servicemen; whereas there is no such reservation in favour of ex-serviceman for recruitment of Welder (Highly Skilled).

16. Rule 5 of the Rules empowers the Central Government to relax any of the provision of Rules with respect to any class or category of persons. It stipulates:

"5. Power to relax:- Where the Central Government is of the opinion that it is necessary or expedient so to do, it may, by order, for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons."

17. Thus the condition precedent for forming an opinion to relax rules are that (i) it is necessary and expedient so to do (ii) the reasons must be recorded in writing. Unless these conditions are fulfilled there cannot be an exercise of power. In other words the rule not only requires an express formation of an opinion but also the reasons based on necessity and expediency of service.

18. The power conferred upon the Central Government to relax any provision of Rules is not for a person but in the exigency of service which is a factor depending upon the circumstances which may arise giving rise to occasional exercise of power to relax. Whether there exists any such situation giving rise to exercise of such power in the case at hand. Admittedly, there is no express order by the Central Government in exercise of its power under Rule 5 of S.R.O. 29/2006. In absence whereof the Tribunal has taken into certain facts to arrive at a conclusion that there is a deemed sanction.

19. In our consideration unless there exists the need which when taken into consideration could lead to formation of an opinion as required by the Rules, then, it is only then, that, an inference can be drawn that there was a deemed sanction.

20. The Tribunal in the present case takes the following the facts as the indices to hold that there was a deemed sanction: "Admittedly, vide circular dated 17.9.2007 (A-5) the Directorate General of EME, Master General of Ord. Branch, Integrated Headquarter of MOD (Army) New Delhi, released 4 vacancies in the trade of Welder Group C (Industrial) Highly Skilled post in the pay scale of Rs. 4000-6000 to be filled by deputation/re-employment. On the strength of said circular applicants, who were Ex-servicemen having rendered more than two decades of service, were appointed against those vacancies in the pay scale of

Rs. 4000-6000. It is not the case of the respondents that said circular has either been withdrawn or necessary corrections were made before issue of offer of appointment. To a specific query raised by the Bench, to the effect that how their pay scale was reduced when according to respondents said appointments were not made strictly in terms of the RRs, counsel for respondents was unable to answer as to why only scale has been reduced and why the entire selection process was not set at naught. We may note that SRO 29 of 2006 which has been strongly relied upon by the respondents vide Rule 5 thereof provides "Power to relax" rules. In this circumstance, one would be justify to conclude that there is deemed relaxation of RRs."

21. These facts are not the facts preceding the decision, but are post decisional facts which cannot be brought within the aspect of deemed factors. The Tribunal in our considered opinion grossly erred in holding that there was a deemed sanction. In fact, as the record reveals there is no sanction to fill in the post of Welder (Highly Skilled) in grade Rs. 4000-6000 by way of Reemployment of ex army personnels.

22. Now coming to aspect of mistake. Trite it is that recruitment is an administrative function (see National Institute of Mental Health and Neuro Sciences Vs. Dr. K. Kalyana Raman and others, . There exist the possibility of committing of administrative mistake. If there is a mistake the same has to be corrected (A quasi-judicial or a judicial error also could be rectified by exercising the power of review).

23. Question is whether such a mistake would create a vested right in favour of the person/persons who are benefited by such mistake. In our considered opinion if due to mistake some benefit is extended in favour of person/persons not eligible for such benefit there is no accrual of right.

24. In Union of India (UOI) and Another Vs. Narendra Singh, it is observed : "32. It is true that the mistake was of the Department and the respondent was promoted though he was not eligible and qualified. But, we cannot countenance the submission of the respondent that the mistake cannot be corrected. Mistakes are mistakes and they can always be corrected by following due process of law."

25. Thus no right accrues on the basis of a mistaken order and the same can be undone; however, by taking recourse to due process of law. In other words the mistakes can be corrected by affording an opportunity of hearing to the incumbents.

26. In the case at hand the order amending the earlier order of appointment has the effect of appointing on a lower grade of Rs. 3050-4590. The respondents were therefore, entitled for an opportunity of hearing. It is seen from the record that after passing of order amending the appointment, respective employees represented to the competent authority who passed the speaking order duly communicated to respective employees. Thus, the employees are subjected to post decisional hearing.

27. In respect of post decisional hearing, placing reliance on various decisions in the field of "natural justice" or the "fair play in action" the learned Author in Principles of Statutory Interpretation: by Justice G.P. Singh : 12th Edn. 2010 observe in Chapter 5 synopsis 6 at page 461 that "Briefly stated "natural justice" means "fairplay in action" and requirements of natural justice depend upon the facts of each case. Therefore, in judging the validity of an order when the complaint is about non-compliance with the principles of natural justice, in cases where the attack is not on ground of bias, a distinction has to be drawn between cases of "no notice" or "no hearing" and cases of "no fair hearing" or "no adequate hearing". If the defect is of the former category, it may automatically make the order invalid but if the defeat is of the latter category, it will have to be further examined whether the defect has resulted in prejudice and failure of justice and it is only when such a conclusion is reached that the order may be declared invalid. Even in cases of "no notice" or "no hearing" the superior courts may in the exercise of their discretion decline to interfere by judicial review (under Article 32 or 226 as the case may be) where on admitted or undisputed facts the view taken by the impugned order is the only possible view and it would be futile to issue any writ to compel observance of natural justice. This is called the useless formality theory. For example, when the petitioner was appointed even though he was not qualified on the cut off date (last date for receipt of applications) and was ineligible to be considered for appointment, cancellation of his appointment without hearing him was not interfered with as it would have been a futile exercise."

28. In Aligarh Muslim University and Others Vs. Mansoor Ali Khan, it is held:

25. The "useless formality" theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C. Mehta referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Staughton L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, De. Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the Court will be prejudging the issue. Some others have said, that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via-media rules. We do not think it necessary, in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.

26. It will be sufficient, for the purpose of the case of Mr. Mansoor Ali Khan to show that his case will fall within the exceptions stated by Chinnappa Reddy, J. in S.C. Kapoor Vs. Jagmohan, namely, that on the admitted or indisputable facts - only one view is possible. In that event no prejudice can be said to have been

caused to Mr. Mansoor Ali Khan though notice has not been issued.

29. In view of above, the action taken by the petitioner in absence of any mala fides does not suffer from the vice of violation of principle of natural justice.

30. Having thus considered we are of the view that the Tribunal was not justified in quashing the orders whereby the appointment orders of respective respondents was corrected from Welder (Highly Skilled) grade Rs. 4000-6000 to Welder (Skilled) Grade Rs. 3050-4590. The order passed by Tribunal is hereby quashed. In the result petition is allowed to the extent above. No costs.